

S. Bryce Farris, ISB No. 5636
SAWTOOTH LAW OFFICES, PLLC
1101 W. River Street, Suite 110
P.O. Box 7985
Boise, Idaho 83707
T (208) 629-7447
F (208) 629-7559
E bryce@sawtoothlaw.com

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DEPARTMENT OF
WATER RESOURCES

Attorneys for Elizabeth Ann and Nick Nettleton

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

IN RE SRBA

Case No. 39576

Subcase No. 61-04029

**MOTION TO SET ASIDE, REOPEN AND/OR
MOTION TO ALTER OR AMEND PARTIAL
DECREE FOR WATER RIGHT NO. 61-04029**

**I.
MOTION**

COMES NOW Elizabeth Ann and Nick Nettleton ("Nettleton"), by and through undersigned counsel of record and pursuant to SRBA AO1 and Rules 60(a) and 60(b)(6) of the Idaho Rules of Civil Procedure, and hereby submits this Motion to Set Aside and Reopen and/or Motion to Alter or Amend Partial Decree for water right no. 61-04029, entered on March 4, 2003 (hereinafter "*Motion*"). Nettleton seeks the correction/clarification that the volume limitation provided in the Partial Decree is applicable only to the stockwater purpose of use in the Partial Decree and is not a volume limitation as to the irrigation purpose of use in the Partial Decree. This *Motion* is supported by the backfile for the water right and Partial Decree, the Affidavit of David Shaw filed concurrently herewith and the discussion/argument provided below.

COPY

II. DISCUSSION / ARGUMENT

A. Motion Pursuant to Rule 60(a)

Section 14.d of Administrative Rule No. 1 provides that “[p]arties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b).” Rule 60(a) of the Idaho Rules of Civil Procedure provides in relevant part that “[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party, and after such notice, if any, as the court orders.”

The types of errors described herein are those to which Rule 60(a) is intended to apply. *Dursteler v. Dursteler*, 112 Idaho 594, 598 (Ct. App. 1987) (The term “clerical mistake” does not mean that it must be made by a clerk. The phrase merely describes the type of error identified with mistake in transcription, alteration or omission of any papers and documents which are traditionally or customarily handled or controlled by clerks but which papers or documents may be handled by others). Accordingly, under this standard, the Partial Decree referenced herein should be set aside and reopened for correction of errors, namely correction/clarification that the volume limitation provided in the Partial Decree is applicable only to the stockwater purpose of use in the Partial Decree and is not a volume limitation as to the irrigation purpose of use in the Partial Decree.

In this case, the adjudication claim for water right no. 61-4029 did not include a volume limitation. *See Aff. of Dave Shaw*, Ex. B. The first time a volume limitation appears in the adjudication claim file is and a “Diversion Amount Review Sheet” dated September 16, 1996. *Id.* paragraph 5. However, the volume limitation on the “Diversion Amount Review Sheet” did not apply to the irrigation purpose of use and instead only applied to the stockwater portion of

the right. *Id.* The next time the volume limitation appears in the adjudication claim file is on a “Profile Report” dated November 21, 1998, the date after the “Notice of Error” report is dated. *Id.* Exs. C and D. This time the volume limitation appears to suggest that it is applied to the entire water right and not just the stockwater portion. Any error concerning the water right and the volume limitation being applied to the entire right was an internal error of the Idaho Department of Water Resources and was not presented to the claimant during the error correction process. The water right was thereafter partially decreed and the issue with the volume limitation did not arise from the claimants, IDWR or the SRBA until 2018 when the Nettletons filed a transfer application to add points of diversion. It was at this time that the Idaho Department of Water Resources first internally began reviewing the issue to determine options/alternatives for resolution of the inappropriate volume limitation. *See Aff. of Dave Shaw*, Ex. E. (IDWR began analyzing whether it could make the change as part of the transfer process and ultimately concluded it could not). IDWR then informed the Nettletons of the volume limitation, that the approval of the transfer would further solidify the error and that alternative to processing the transfer is for the Nettletons to approach this Court to seek a correction of the partial decree and correct the volume amounts. *Id.* Exs. A and E. Nettletons are now following this suggestion by filing this Motion.

This is the type of error which was not adjudicated, was not part of claim of the claimants and thus should be corrected pursuant to Rule 60(a) of the Idaho Rules of Civil Procedure. Accordingly, Nettleton requests that the Court re-open, modify and/or amend water right no. 61-4029 to clarify that the volume limitation is only applicable to the stockwater portion of the right.

B. Motion Pursuant to Rule 60(b).

Rule 60(b)(6) of the Idaho Rules of Civil Procedure authorizes this Court to alter or amend a partial decree for “any other reason that justifies relief.” I.R.C.P. 60(b)(6). Rule 60(b) provides in relevant part that “the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment.” I.R.C.P. 60(b).

The mistakes and/or errors described herein can also be corrected according to Rule 60(b)(6). Whether to grant a motion made under Rule 60(b) is a discretionary decision of the trial court, requiring the Court to determine facts concerning the orders (Partial Decrees) issued and to apply Rule 60(b) criteria to those facts. *Bull v. Leake*, 109 Idaho 1044, 1047 (Ct. App. 1986). Relief from a judgment under clause (6) of Rule 60(b) is appropriate “whenever ‘such action is appropriate to accomplish justice.’” *First Sec. Bank, N.A. v. Stauffer*, 112 Idaho 133, 142 (Ct. App. 1986).

In this case, there are adequate facts and reasons for the Court to grant Nettleton’s *Motion*. As discussed, *supra*, Nettleton has submitted adequate facts and good faith support for the reasons that neither Nettleton or its predecessor submitted a claim (initial pleading) with a volume limitation to the right, and the volume limitation did not show up on the right until after the “Notice of Error” correction process. In fact, the Idaho Supreme Court has stated that when the relief granted is inconsistent with the pleadings and evidence, in this case the Partial Decree is inconsistent with the claim and evidence, then relief under Rule 60(b)(6) may be appropriate. “We have recognized that relief under Rule 60(b)(6) may be appropriate where the district court granted relief that is inconsistent with the pleadings and evidence in the case is beyond what was sought in the complaint.” *Eden v. State of Idaho*, 2018 Ida. Lexis 43 (March 2, 2018) quoting

Dawson v. Cheyovich Family Trust, 149 Idaho 375, 380-81, 234 P.3d 699, 704-05 (2010)

(holding that the discrepancy between the complaint and the remedy ordered by the district court may be a “unique and compelling circumstance upon which relief under a Rule 60(b)(6) motion may be justified”). Here, neither the claim or pleadings included a volume limitation for the irrigation purpose of use of the Partial Decree. This is precisely the unique and compelling circumstances the Court can and should recognize as justifying relief under Rule 60(b)(6).

Finally, Chapter 14, Title 42, Idaho Code is replete with references indicating legislative intent that water rights claimed in an Adjudication be accurately recommended and decreed. Accordingly, it is important that for justice to be accomplished in this case, and have the water rights at issue herein be accurately decreed.

The Nettletons are aware of this Court’s reluctance to set aside or reopen partial decrees based on the finality of the SRBA. However, Administrative Rule No. 1 specifically provides for relief pursuant to I.R.C.P. 60(a) or 60(b), and while the Court is reluctant to grant such motions and desires the finality of the SRBA, those Rules and the relief available therefrom are in AO1 because it was anticipated that there have to be some unique and compelling circumstances which would allow for such relief. This matter is such a case. The Nettletons contend that the factual circumstances and other reasons for this *Motion*, including the fact that the volume limitation was added by the Department after the notice of error, and the fact that the volume limitation if applied to the irrigation purpose of use essentially renders the water right meaningless, is sufficient grounds in this particular subcase to grant the *Motion*. Moreover, the granting of this *Motion* does not and will not expand the universe of partial decrees which may be reopened but rather applies Rules 60(a) and 60(b)(6) as they were intended to correct errors in the interest of justice.

**III.
CONCLUSION**

For the reasons set forth herein, Nettleton respectfully requests that the erroneous diversion volume for water right no. 61-04029 be corrected/clarified so that any volume limitation shall only be applicable to the stockwater purpose of use in water right no. 61-04029.

DATED this 28th day of September, 2018.

SAWTOOTH LAW OFFICES, PLLC

By 
S. Bryce Farris
Attorneys for the Nettletons

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of September, 2018, I caused a true and correct copy of the foregoing **MOTION TO SET ASIDE, REOPEN AND/OR MOTION TO ALTER OR AMEND PARTIAL DECREE FOR WATER RIGHT NO. 61-04029** to be served by the method indicated below, and addressed to the following:

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Office of the Attorney General
State of Idaho
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S. Bryce Farris